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Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

MID AMERICA TITLE COMPANY,

Petitioner,

v.

TRANSNATION TITLE INSURANCE COMPANY and LAND AMERICA FINANCIAL GROUP, INC.,

Respondents.

- ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner entered into an agency agreement with Respondent Transnation which prohibited the Respondent from directly or indirectly issuing policies of title insurance in Petitioner's exclusive geographical territory. Petitioner alleges that Respondents breached this agreement by indirectly issuing policies of title insurance through related sister companies owned by the same holding company.

The question presented is whether the decision to pierce the corporate veil and/or to treat sister companies as alter egos should be made by a jury as the trier of fact or whether it should be made by a trial judge or a court of appeal as a matter of law? There is no definitive authority on this issue.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Mid America Title Company is a valid Illinois corporation in good standing. At all times relevant hereto, it had no corporate parents and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's judgment entering a jury verdict in favor of the Petitioner is included herewith as Appendix C. The district court's denial of Respondent's motion for judgment as matter of law, alternative motion to amend the judgment, or for a new trial is included herewith as Appendix B. The court of appeals opinion reversing the district court is published at 332 F.3d 494 and is included herewith as Appendix A. The court of appeals denial of a petition for panel rehearing is included herewith as Appendix D.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on June 16, 2003, and denied rehearing on July 3, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

Petitioner Mid America Title Company is a title insurance agent and provider of escrow settlement services in connection with real estate transactions. Respondent

Transnation Title Insurance Company is a real estate title insurance underwriter. Respondent Land America Financial Group, Inc. is a holding company that owns several title insurance underwriters, including Transnation.

In 1983, Mid America entered into an agency agreement with Transnation. It provides that Mid America would be Transnation's exclusive agent for title insurance and escrow settlement services for real estate transactions in the Chicago area. The agreement also provided that Transnation would refer all of its title insurance business in the Chicago area to Mid America. Importantly, the agreement prohibited Transnation from directly or indirectly issuing policies of title insurance in the Chicago area through anyone other than Mid America.

In reliance upon the exclusive agency agreement, Mid America entered into and expanded its business operations including but not limited to owning and leasing office space in the geographical area, hiring and training qualified personnel for the handling of business, preparing and maintaining files relating to applications for title insurance, and creating and maintaining title insurance plants for a multi-county area.

In 1990, Reliance Insurance Company, the parent company of Commonwealth Land Title Insurance Company (hereinafter referred to as "Commonwealth"), purchased Transnation. Shortly after the acquisition of Transnation by Reliance Insurance Company, Transnation and Commonwealth merged together their Illinois business operations. Since 1990 and continuing through present, Transnation and Commonwealth have shared officers, directors and trustees. Commonwealth has maintained both direct and agency operations in the Chicago area since 1990.

In 1998, Respondent Land America Financial Group (hereinafter referred to as "Land America") acquired all of the issued and outstanding shares of Transnation and Commonwealth. Since that time, Land America has continued transacting business by and through its subsidiary title insurance companies, Commonwealth, Transnation and Lawyers' Title Insurance Corporation (hereinafter referred to as "Lawyers Title"). Lawyers Title has maintained both direct and agency operations in the Chicago area since 1998.

Since February 1998 and continuing through present, Land America, Transnation, Commonwealth and Lawyers' Title have shared some of the same officers, directors and trustees. Since September 1998, employees of Land America jointly responsible for all Transnation, Commonwealth and Lawyers Title operations in the State of Illinois have shared the same office space in Chicago, Illinois. Transnation is a wholly owned subsidiary of Land America and uses its profits to pay dividends to Land America. Commonwealth and Lawyers Title compete with Mid America for title insurance business.

The President of Transnation, Commonwealth and Lawyers Title is the same person. The corporate vice president and secretary for all three entities is also one person. Respondents did not offer evidence of the existence of any one person who is an employee of only one of the three title companies that compromise the LandAmerica group. The individuals who testified at trial comprised all of the top level executives responsible for Illinois operations during the relevant time periods.

In 1997, the Chief Executive Officer and Chief Operating Officer of Commonwealth invited the President of

Mid America to attend a social function at the Kentucky Derby. This correspondence was sent on Commonwealth letterhead despite the fact that Mid America is a Transnation agent. Mid America received other correspondence relating to business operations of their underwriter on Commonwealth letterhead.

Title insurance agents such as Mid America are often required to issue hold harmless letters in the regular course of their day-to-day business. A hold harmless letter is an assurance to another title company or to a third-party that a title insurance policy issued by the agent is valid and binding. It states that subsequent parties obtaining an interest in the insured real estate will be protected and indemnified for any matters which might or could relate to defects in title which arose prior to the issuance of the agent's policy. Since April 1998, it has been the policy of Land America, Transnation, Commonwealth and Lawyers' Title to not require hold harmless letters if a party to the transaction they are asked to insure produces a prior policy from Transnation, Commonwealth or Lawyers' Title.

In or about August of 1998, Mid America solicited Michael Freedman to become an attorney agent for Transnation and accepted an attorney agent application from him. Transnation rejected the application. Less than six months after rejecting Michael Freedman as a Transnation attorney agent, Michael Freedman d/b/a BL Title applied to become a title insurance agent with Lawyers' Title. Lawyers' Title accepted Michael Freedman d/b/a BL Title as an agent in early 1999.

The Agency Agreement between Transnation and Mid America states "Transnation does solicit employee

transfer business and other national real estate transactions. Transnation shall refer to issuing agent (i.e. Mid America) all such business that is obtained in the territory of issuing agent including but not limited to, business derived from any Transnation branch offices". Mid America complained to Transnation about what it believed to be a lack of referrals.

From 1990 through 1995, Preferred Land Title Insurance Company was a title insurance agent for Commonwealth in Mid America's geographical territory. In late 1995 or early 1996, Preferred Land Title Company was closed down. At the time Preferred Land Title was closed down, an officer of both Commonwealth and Transnation referred the existing business of Preferred Land Title to Imperial Land Title, Inc., a Commonwealth agent who is engaged in direct competition with Mid America.

On September 13, 1990, an attorney with offices in Denver Colorado placed an order for a title commitment on property located in Lake County, Illinois to Transnation's Denver, Colorado office. LandAmerica and Transnation were contractually obligated to refer said title insurance order to Mid America. The Denver office of Transnation instead referred the order to the downtown Chicago office of Lawyers' Title.

Land America has a site on the World Wide Web which contains an office locator section. If a visitor to that web site asks for a Transnation agent in Waukegan, Illinois (Mid America's home base), they are told that no such agent exists. Instead, they are referred to a Commonwealth office in Chicago, Illinois.

In April 2001, Land America ran advertisements in Northern Illinois Real Estate Magazine and Metro Chicago Real Estate magazine. The ad states "Land America Financial Group, Inc. is the parent company of Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation and Transnation Title Insurance Company. The three title insurance companies offer products and services under their own familiar names but operate as one company with one management team." Those magazine ads were consistent with the statements made by upper level management in 1997.

Mid America filed a complaint in state court alleging breach of its agency agreement. Respondents removed the case to federal court pursuant to 28 U.S.C. § 1446 and 28 U.S.C. § 1332. Jurisdiction arose under 28 U.S.C. § 1441 because of a complete diversity of citizenship between the plaintiff and both defendants, because none of the defendants was a citizen of the state of Illinois and because the amount in controversy exceeded $75,000.00.

Mid America's complaint alleged that by allowing its officers, directors, trustees, employees and agents to issue Commonwealth and Lawyers Title title insurance policies in Mid America's geographical territory, Transnation breached its Agency Agreement with Mid America. Said Agreement prohibits Transnation from indirectly issuing policies covering real property in said territory. Mid America did not give approval to the officers, directors, trustees, employees and agents of Transnation to also issue policies through Commonwealth or Lawyers Title in Mid America's geographical territory.

The evidence adduced at trial showed that in the eleven years from 1990 through 2001, Mid America remitted $4,700,000.00 in net title insurance premiums to Transnation. During the same period, Transnation paid out only $1,000,000.00 in claims. Therefore, the net profit to Transnation during the aforesaid time period was $3,700,000.00. Transnation and Land America offered absolutely no evidence to refute the $3,700,000.00 figure.

After some three days of trial, a jury returned a verdict in favor of Land America and against Mid America. It also returned a verdict in favor of Mid America against Transnation and awarded damages in the amount of $1,500,000.00. The trial court entered judgment consistent with the jury verdict and denied without comment Respondents' post trial motions for judgment as a matter of law, to amend the judgment and for a new trial.

The Appellate Court reversed the jury's verdict and the judgment entered consistent with it. The reason given was that there was insufficient evidence for the jury to have found that Transnation was the alter ego of either of the other underwriters. By so doing, the Appellate Court substituted its judgment for the judgment of the jury. The Appellate Court also denied a petition for panel rehearing.

REASONS FOR GRANTING THE PETITION

The petition should be granted because there are is no definitive authority on whether the decision to pierce the corporate veil and/or to treat sister companies as alter egos should be made by a jury as the trier of fact or whether it should be made by a trial judge or a court of appeal as a matter of law.

Respondents were contractually bound "not to issue, directly or indirectly, policies covering real property within the territory other than through issuing agent (i.e. Mid America), without issuing agents approval." Mid America does not allege that Transnation directly issued title insurance policies. Instead, the evidence at trial showed that Transnation indirectly issued policies in the relevant territory by allowing Transnation and Commonwealth to commingle their operations since 1990 and by allowing Transnation and Lawyers Title to commingle their operations since 1998.

Rather than allowing itself to act solely as the Plaintiff's principal underwriter, Transnation competed with the Plaintiffs for title insurance business. While no entity other than Mid America issued title insurance policies on Transnation paper in the geographical territory, all Transnation employees responsible for its Illinois operations performed the same functions for Commonwealth and Lawyers Title as they did for Transnation.

With the agreement of the parties and the trial court, the jury was given a "Corporate Entity – Alter Ego" instruction based on Arizona law, the state of Transnation's incorporation, to wit:

> A corporation, generally, is a separate legal entity authorized under the law to do business in its own right and on its own credit as distinguished from the credit and assets of other persons or corporations. Also, the mere fact that one or two individuals own and control the stock structure of a corporation, or that two corporations have

> common officers or directors, or both, does not mean that the corporation may be regarded as the alter ego of its stockholders.
>
> However, the existence of a corporate entity may be disregarded where it is proved that the corporation was created as a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose.
>
> Where one corporation is the principal stockholder of several corporations and conducts their business or manages their assets, that corporation may be found individually liable for the corporate obligations of the other corporations. In order to find the first corporation liable, the plaintiff must prove that the first corporation has consistently engaged in a course of conduct ignoring the existence of the other corporations' corporate identities and has, in fact, conducted business by exercising such paramount control over the operations of the several corporations that their corporate existence has been disregarded and their business interests and the first corporation's own interests cannot be reasonably separated.

Given that instruction, the jury made a factual determination that Transnation should be held responsible for using its siblings, Commonwealth and Lawyer's Title, to compete with Mid America in Mid America's exclusive

geographical territory. The district court concurred with the jury's determination and denied motions for judgment as a matter of law, to amend the judgment and for a new trial. The appellate court disregarded these findings of fact and determined, as a matter of law, that Transnation should not be treated as the alter ego of Commonwealth and Lawyer's Title.

The lack of definitive authority on whether to treat the decision to pierce the corporate veil and/or to treat sister companies as alter egos as an issue of fact or as a matter of law is well summarized in *McCall Stock Farms, Inc. vs. United States*, 14 F.3d 1562 (Fed. Cir. 1993), to wit:

> In circumstances where a court is called upon to pierce a corporate veil in the first instance, . . . there is a division of opinion about the precise nature of such judicial action and, as a result, the proper standard of appellate review. It is generally recognized that disregarding the legal separateness of a corporation and the individuals who control it entails the exercise of equitable power. *See* 1 William M. Fletcher, Cyclopedia of the Law of Private Corporations § 41.25 (rev. ed. 1990 & Supp. 1992); *see, e.g., First Nat'l City Bank vs. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 629, 77 L. Ed. 2d 46, 103 S. Ct. 2591 (1983); *International Controls Corp. vs. Vesco*, 490 F.2d 1331, 1350-1351 (2nd Cir.), *cert. denied*, 417 U.S. 932, 41 L. Ed. 236, 94 S. Ct. 2644 (1974). This view reflects the classical conception of equity's function, even in a merged procedural system, of relieving individuals from the operation of a generally just legal rule to prevent a

particularized injustice that the framers of the rule cannot be presumed to have intended. *See, e.g., First National City Bank*, 462 U.S. at 629; 1 William S. Blackstone, Commentaries on the Laws of England 61 (1765) (citing Grotius); 3 *id.* at 429-32. Because of its discretionary and ad hoc nature, *see* Henry L. McClintock, Handbook of the Principles of Equity 2, 49, 51 (1948), equitable dispensations traditionally have been reviewed on appeal under an abuse of discretion standard, *Brotherhood of Locomotive Engineers vs. M.K.T.R. Co.*, 363 U.S. 528, 535, 4 L. Ed. 2d 1379 80 S. Ct. 1326 (1960); *see e.g., Consumer's Co-op vs. Olsen*, 142 Wis. 2d 465, 419 N.W.2d 211, 213 (Wis. 1988).

On the other hand, some courts treat the alter ego determination as a question of fact reviewed under the "clearly erroneous" standard, *see, e.g., United States vs. Joh-T Chems., Inc.*, 768 F.2d 686, 694 (5th Cir. 1985), and the ultimate decision to pierce the corporate veil as a conclusion of law, albeit one that follows almost automatically from the ultimate factual finding concerning alter ego status, subject to de novo review. *See* 1 Fletcher, supra, § 41.95. This approach is consistent with the view that the doctrine has been fully absorbed into the law itself, thus constituting an exception to, rather than a suspension of, the legal rule of corporate separateness. See generally *Piper Aircraft Corp. vs. Wag-Aero, Inc.*, 741 F.2d 925, 937, 939 (7th Cir. 1984) (Posner, J., concurring).

To supplement the above quotation from *McCall Stock Farms*, the Second Circuit and the Fourth Circuit have held that the determination of whether to pierce the corporate veil is a question of fact which must be determined by a jury. *See Wm. Passalacqua Builders vs. Resnick Developers*, 933 F.2d 131 (2nd Cir. 1991) and *In re: County Green Ltd. Partnership*, 604 F.2d 289 (4th Cir. 1979).

A writ of certiorari should be granted in this case because it will give the Court the opportunity to clarify a now vague but very important issue. In an era where corporations, both publicly traded and privately held, are collapsing in alarming and often scandalous fashion, the lower courts need guidance on how to handle issues relating to alter egos and piercing of the corporate veil. This case also gives the Court an opportunity to resolve any inconsistencies between the circuits as recognized in *McCall Stock Farms*.

However this court rules, new and significant precedent will be established. If this court chooses to reverse the appellate court and affirm the district court, it will establish that whether to hold one corporation responsible for the acts of its sibling corporations is a question of fact. If this court chooses to affirm the appellate court, the determination of alter ego status will be left solely to the courts as a matter of law without the need for a jury determination. Either way, confusion over how to treat litigation over alter ego and corporate veil issues in the future can be eliminated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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